N THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 327/2005

Shri Shashikant Vithal Telang
aged 34 years, occupation service,
residing at Flat No.518, 1st Floor,
Varun Building, Wilson Nagar,
Davodli, Salcete, Goa. ..... Appellant.

V/s.

1. Government of Goa,
   through the Chief Secretary,
   with office at Secretariat,
   Vidhan Sabha Complex,
   Porvorim, Goa.

2. The Assistant Registrar of
   Co-operative Societies,
   South Zone, with office at Kiran Hall,
   Aquem, Margao, Goa.

3. The Madgaon Co-operative Bank Ltd.,
   through its Chairman]
   with Office at Aquem Alto,
   Margao, Goa.

4. M/s. Divya Realtors,
   a registered partnership firm,
   having its office at Almira Apartments,
   Margao, Goa, represented by its Partners :

   (a) Shri Harshand Jaganant Kunde, son of
   Jaganant Kunde, major in age,
   businessman,

   (b) Shri Trivikram Prabhakar Netravalkar,
   son of Prabhakar Netravalkar,
   major in age, businessman,

   Both residing at C/o. Almira Apartments,

Margao, Goa. ..... Respondents.

Mr. Sudesh Usgaonkar, Advocate for the appellants.

Ms. W. Coutinho, Government Advocate for the respondents No.1 and 2.

Mr. C. A. Coutinho, Advocate for the respondent No.3.

CORAM : P.V. KAKADE, J.

DATE : 21ST SEPTEMBER, 2006.

ORAL JUDGMENT :

Rule. Rule made returnable forthwith by consent.

2. This is an appeal preferred by the original plaintiff against the Judgment and Order passed by the Addl. District Judge, Margao, rejecting his plaint under Order 7, Rule 11(d) of the Code of Civil Procedure.

3. Heard learned Counsel for all the concerned parties. Perused the record. The appellant-plaintiff filed the suit to seek injunction against the defendant No.2 from auctioning the suit flat and removing the seal put for the suit flat. According to the plaintiff he had entered into an agreement for sale/construction with defendant no.5, the builder for the purpose of purchase of rights/shares in the property surveyed under No.6/2 of Village

Davorlim and for construction of Flat No.F-8 on the first floor for which purpose he obtained loan of Rs.72,000/- from his employer. The said building was to be constructed by defendant No.4. After grant of loan, the plaintiff got executed mortgage in respect of the said flat towards security of the loan. As per the agreement executed between the plaintiff and the defendant No.4, defendant No.4 did not complete the flat in all respects and some defects remained and as per the said agreement between them, an amount of Rs.8,000/- remained to be paid to the defendant No.4 towards the said flat as well as the proportionate right in the land. The total amount paid by the plaintiff to the defendant No.4 was Rs.1,74,000/-. Defendant No.4 issued occupancy certificate to the plaintiff in the month of March, 1995. The plaintiff is in occupation of the suit flat and the payment is withheld for non-performance of the agreement on the part of defendant no.4.

4. On this background, it is alleged that on 20.7.1998, the officials of the defendants No.1 and 3 came at the site and made inquiries with the plaintiff as to who had broken the seals which were put by them to the suit flat. Upon such inquiries, the plaintiff came to know that the said officials were inquiring about the seal which was allegedly put up to the flat, for which purpose a criminal complaint was also said to be filed. The

plaintiff submitted that the officer of the defendant no.2 had again come to the plaintiff on 7.10.1998 and informed the plaintiff that they would be putting the seal on the suit flat which was in occupation of the plaintiff. Hence, the suit for perpetual injunction came to be filed against the defendants.

5. Defendants No.2 and 3 appeared and filed their written statement, inter alia, denying the allegations made by the plaintiff. However, curiously enough the defendants did not raise a plea to the effect that the suit was not maintainable in law for want of notice under Section 164 of the Maharashtra Co-operative Societies Act, 1960 (hereinafter, referred to as "the said Act").

Thereupon, the lower Court proceeded to frame issues on the basis of the pleadings of the parties. One of the said issues settled by the lower Court appears to be whether the defendant No.3, the Madgaum Urban Co-operative Bank Ltd., proves that the plaintiff had no locus standi to file the suit against defendants No.2 and 3. It is also to be seen that since no plea was raised regarding maintainability of the suit for want of notice under Section 164 of the said Act, no issue in that regard came to be settled.

When the matter was about to proceed for trial according to

law, an application was made by defendant No.2 i.e. the Asst. Registrar of Co-operative Societies under Order 7, Rule 11(d) of C.P. Code, inter alia seeking relief of rejection of the plaint. After hearing both the parties, the learned trial Judge was of the view that the plaint was liable to be rejected by virtue of the provisions of Order 7, Rule 11 (d) of the C.P.Code.

6. At the outset, it may be noted that a perusal of the order of the lower Court reflects confusion in the mind of the trial Judge in the sense that while the application was clearly in respect of the provisions of Order 7, Rule 11(d) of the C.P. Code, the learned trial Judge proceeded to deal with the said application as if it was under Rule 11, sub-clause (a) of Order 7 of the C.P. Code. Order 7, Rule 11(d) of the C.P. Code reads thus :

> "The plaint shall be rejected in following cases :
> (d) Where the suit appears from the statement in the plaint to be barred by any law. "

7. So far as sub-clause (a) is concerned, it provides that the plaint shall be rejected when it does not disclose the cause of action. In the present case, cause of action is clearly disclosed in the plaint itself. In the concluding part of the impugned order, the learned trial Judge has observed that on meaningful reading of the entire plaint vis a vis the relief claimed, it was clearly demonstrated that there existed no cause of action for the plaintiff

to institute the suit against the defendants No.2 and other defendants as the same was concerning the business of the society coming under the purview of the said Act which was factually wrong observation. On making this observation, he proceeded to reject the plaint under Order 7, Rule 11(d) of the C.P.Code purportedly holding that the contents of the plaint did not disclose that the plaint was barred by any other legal provision i.e. in this case, the requirement of notice under Section 164 of the said Act.

That apart, even on merits, the learned trial Judge is of the view, on perusing the entire record, that in the suit for perpetual injunction, the plaintiff has sought the relief only against defendant No.2, restraining the defendant from putting any seal to the suit premises thereby holding that the relief was indeed claimed only against defendant No.2 and not against defendant No.3. A perusal of the plaint also discloses that in fact the relief is claimed only against defendant No.2. As observed by the learned trial Judge if it is so, though defendant No.2 who is the Asst. Registrar of the Co-operative Societies may or may not be an authority covered by and contemplated under Section 164 of the said Act, the question will have to be necessarily decided by the trial Court on the basis of the evidence to be led by the parties as it is a mixed question of law and fact. The learned Counsel for respondent No.3 i.e. the Madgaum Urban Co-operative Bank Ltd., vehemently urged that since they were a co-operative society within the meaning of the said Act, the alleged act of the defendant did cover and

touch the business of the Society and, therefore, notice under Section 164 of the said Act was mandatory. In my considered view, the plea in respect of the maintainability of the suit for want of notice should be and would be necessarily a defence for the defendants which would be adjudicated by the trial Court either as a preliminary issue or along with other issues and no resort could be taken to the provisions of Order 7, Rule 11(d) of the C.P. Code for the plain reason that what was required to be seen from the averments made in the plaint would disclose any bar of law in challenging the maintainability of the suit which, in my considered view, has to be adjudicated by giving opportunity to both sides, after raising proper issues in that respect.

8. The learned Counsel for the respondent No.3 sought to place reliance on Single Judge ruling of this Court in the case of ***Suprabhat Co-operative Housing Society Ltd., and anr. vs. Span Builders and another.,*** 2002(3) Mah. L.J. 837 wherein the learned Single Judge came to the conclusion on the basis of the facts and circumstances involved in that case that if it was disclosed that there was no notice under Section 164 of the said Act and if the facts and circumstances revealed that the matter involved in the dispute was touching the business of the society then the invocation of the provisions of Order 7, Rule 11(d) of the C.P. Code was

justified and accordingly, the plaint was required to be rejected for want of notice under Section 164 of the said Act. It further held that it was needless to add that it would be open to institute a fresh suit after due notice was issued. On perusal of the judgment, I am of the considered view that no doubt that the ratio laid down by this Single Judge Judgment could be applicable to the facts and circumstances involved in that case, however, the legal proposition established by this ruling cannot have universal application when the facts and circumstances involved in this mater differ. In the present case, what is revealed from the record is that not only the written statement was filed by respondents no..2 and 3 and issues were settled by the trial Court, but there was an application filed by the defendants raising the question of maintainability of the suit for want of notice under Section 164 of the said Act which I am told was not adjudicated at all. Thereafter, the present application under Order 7, Rule 11(d) of C.P. Code came to be filed, which was adjudicated in fact by the trial Court as if it was an application under Order 7, Rule 11(a) of the C.P. Code without touching the question involved and contemplated by Rule 11 (d) of Order 7 of C.P. Code. In view of this factual matrix, I am of the considered view that there was no propriety, though it cannot be said that it was an illegality, to entertain the application to keep aside all other aspects and take up the application under Order 7, Rule 11(a) for adjudication,

especially when the course was open for the learned trial Judge to raise the issue regarding maintainability of the suit for want of notice under Section 164 of the said Act was available. It could be adjudicated either as a preliminary issue or one of the issues along with other issues on record. This is especially so when the trial Judge was aware of the fact that the relief was claimed only against respondent No.2 and not against respondent No.3, the co-operative Bank. In other words, it must be remembered that want of statutory notice can be a ground of defence in a suit, but it could not be the basis of an application for rejection of the plaint.

9. For the reasons recorded above, I am inclined to hold that the judgment of the learned Single Judge relied upon by respondent No.3, as noted above, is not applicable to the present set of facts and for the reasons recorded hereinabove, the appeal is allowed. The order dated 17.11.2004 rejecting the plaint under Order 7, Rule 11(d) of the C.P. Code is, hereby, set aside. The matter is remitted to the lower Court with a direction to raise the necessary issue regarding maintainability of the suit for want of notice under Section 164 of the said Act and it may either be tried as a preliminary issue or along with other issues, after giving opportunity to both the sides to lead evidence, if any, in that regard. With this direction, the appeal stands disposed of.

10. In the result, the rule is made absolute. No order as to costs.

P.V. KAKADE, J.

ssm.